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COMMENTS OF GOVERNMENTS ON THE REPORT OF THE WORKING GROUP ON A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT

Addendum

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COMMENTS RECEIVED FROM MEMBER STATES

KUWAIT

[Original: Arabic]

[3 August 1994]

1. Two formulations are given for article 2 of the draft. In the first, the tribunal would be an organ of the United Nations and in the second it would be linked with the United Nations as provided for in the statute. The first version would require amendment of the Charter of the United Nations to permit the tribunal to be regarded as a United Nations organ, while if the second were adopted it would suffice for a kind of link to be established with the Organization such as a treaty of cooperation along the lines of those between the United Nations and its specialized agencies, a separate treaty providing for the election of judges by the General Assembly, etc. The tribunal, as a judicial organ of the United Nations, would thereby acquire the necessary authority and permanence. The second formulation should be accepted for the reasons given and because it would accelerate the adoption of the statute. The first version, on the other hand, might require amendment of the Charter and this would be difficult in practical terms.

2. Article 9 states that the judges shall be independent, that they shall not engage in any activity which interferes with their judicial functions or affects their independence and that in case of doubt the court shall decide. Obviously, what is meant is that the court shall decide the matter, that is, the matter of whether these conditions are met with respect to those elected judges of the tribunal. The word "therein" (fi dhalika) should therefore be added to the end of the article in order to clarify its meaning. The question then remains of how the court will ascertain that the aforesaid conditions are met with respect to those elected for appointment to the tribunal at the time of their nomination and while the court has yet to be formed. The court will be formed of those selfsame judges, and its formation will thus follow their appointment.

3. Paragraph 1 of article 11 states that judges shall not participate in any case in which they have previously been involved in any capacity whatsoever, or in which their impartiality might be open to doubt (shakk) on any ground, including an actual, apparent or potential conflict of interest. Clearly, the term "impartiality" ('adam tahayyuz) in the third line of the paragraph is not intended or is simply a typographical error, since what is meant is the existence of a suspicion (shakk) of partiality by the judges and not the opposite. The prefix "im-" (the word 'adam) should therefore be deleted in order to remove the confusion.

4. The disqualification of judges in any case in which they have previously been involved in any capacity whatsoever, or in which suspicion of partiality might arise on any ground, including an actual, apparent or potential conflict of interest, as worded, extends of course to all previous expressions of opinion on the case of whatever kind, e.g., acting as prosecutor or deputy prosecutor,

participating in the investigation of the case in any way or in any capacity or appearing with the accused as defence lawyer in any pre-trial investigation.

5. Paragraphs 3 and 4 of the article state that the accused may also request the disqualification of a judge under paragraph 1, that any question concerning the disqualification of a judge shall be settled by a decision of the absolute majority of the chamber concerned, that the chamber shall be supplemented for that purpose by the President and the two Vice-Presidents of the court and that the challenged judge shall not take part in the decision.

6. Since it is possible that the body so formed after the exclusion of the judge or judges challenged might consist of an equal number of judges, paragraph 4 of the article should be amended to stipulate that any question concerning the disqualification of a judge shall be settled by a decision of an absolute majority of the chamber concerned and that in the event of a tied vote the side on which the President has voted shall prevail. A paragraph 5 should be added to the article placing a limit on the number of judges whose disqualification the accused may request for any reason - with the exception of disqualification on grounds of previous participation in any capacity whatsoever in the case - so that abuse of the right of challenge by the accused does not create a situation where there is an insufficient number of judges qualified to decide on the charge against him and the trial is thus suspended.

7. Article 13, paragraph 1, states that the Procuracy shall be composed of a Prosecutor, who shall be head of the Procuracy, a Deputy Prosecutor and such other qualified staff as may be required. This means that although other staff are included in the composition of the Procuracy, the draft does not establish procedures for their appointment or specify what guarantees are accorded to them in the performance of their duties in assisting the Prosecutor and Deputy Prosecutor. The draft does not specify their powers and contains no reference to how they are to be determined, and it does not state whether or not the same restriction applies to them as is placed on the Prosecutor by article 13, paragraph 7, namely that he shall not act in relation to a complaint involving a person of the same nationality.

8. Article 15, paragraph 2, states that where the Prosecutor is found, in the opinion of two thirds of the court, guilty of proved misconduct or in serious breach of the statute, he shall be removed from office. The commentary on the article states that one member of the Working Group had found it strange that the Prosecutor could be removed by an organ different from that which had elected him and thought that this might compromise his independence before the court. We agree with this view and consider that the Prosecutor should be removed by the organ that elected him and not by the court. According to article 16, paragraph 4, of the statute, the court may not, in order to ensure his independence, revoke the immunity of the Prosecutor. How then can it be allowed to decide on his removal from office?

9. Article 19 states that the court may, by a majority of the judges and on the recommendation of the Bureau, make rules for the conduct of pre-trial investigations, the procedure to be followed and the rules of evidence to be applied in any trial and any other matter necessary for the implementation of the statute. The formulation of rules for the conduct of pre-trial

investigations, for the procedure to be followed and the rules of evidence to be applied in any trial and for any other matter necessary for the implementation of the statute is a purely legislative act supplementary to the statute, and it is therefore not part of the function of the judges of the tribunal. Such provisions should therefore be incorporated into the statute or annexed thereto so that the judges of the tribunal are obligated to apply them in the cases brought before them. The rules of procedure of the tribunal, however, may be determined by its court.

10. The place of article 21 of the statute is inappropriate, and we consider that it should be part of the final clauses.

11. Article 23 of the draft establishes rules relating to the acceptance by States parties to the statute of the jurisdiction of the court over one or more of the crimes referred to in article 22 and, in doing so, sets forth three alternatives. Alternative B, paragraph 1, states that, unless it makes the declaration provided for in paragraph 2, a State becoming party to the statute is deemed to have accepted the jurisdiction of the court over any crime referred to in article 22, if it is a party to the treaty which defines that crime. Paragraph 2 provides that a State party to the statute may indicate that it does not accept the jurisdiction of the court over one or more of the crimes referred to in paragraph 1. We support the adoption of this proposal as being in keeping with the purpose of elaborating the statute of the proposed tribunal, namely the need to prosecute perpetrators of the crimes within its jurisdiction provided that a State party does not declare that it does not accept the jurisdiction of the court over one or more of the crimes referred to in article 22 of the draft. Such a declaration, as specifically stated in article 23, paragraph 3, will not affect any proceedings already commenced under the statute. It will thus not prevent the completion of those proceedings, that is to say the completion of inquiries or trials that may have commenced regarding any charges or crimes referred to in article 22 of the statute and thus will not prevent their being brought to trial and the verdicts reached, as the case arises. That is to say that such a declaration will affect only events and charges subsequent thereto.

12. Kuwait agrees with the provisions of article 25, namely that the proposed court also has jurisdiction over cases referred to in articles 22 or 26 (2) (a) which may be submitted to it on the authority of the Security Council. This would enable the Security Council to make use of the proposed court as an alternative to establishing special tribunals. The United Nations General Assembly should also have the power to refer cases to the court, particularly where the Security Council is unable to adopt a resolution because of the use of the veto by one of its five permanent members.

13. Article 31 provides that a person may be arrested or detained under the statute for such period as may be determined by the court in each case, but it does not establish a maximum period for such detention. This is an exceptional measure on which there must be limits, and it may not be maintained for such a long time as to become a penalty.

14. It has already been stated that it would be preferable for the statute of the tribunal to have a binding character. All States that acceded would thus have accepted the jurisdiction of the court and would therefore be bound by its

requests and decisions with regard to the provisions of articles 24, 26, 29 and article 33, paragraph 2.

15. We agree with the view, as set forth in the commentary to article 37, that the membership of the Chambers should be predetermined on an annual basis in order to avoid any suspicion of a particular judge being selected to consider a particular case.

16. Our views on article 38 are as follows:

(a) Challenges to the jurisdiction of the court should be restricted to States that have a direct interest in the case, the criteria for interest in the case, rebuttals and challenges being those in use under national law;

(b) The question of jurisdiction is an essential matter concerning which the draft requires the tribunal to satisfy itself and to decide of its own accord that it has no jurisdiction if such should seem to it to be the case. Since the draft gives the accused the right to challenge the jurisdiction of the tribunal at any stage, the same right should, by analogy, be accorded to the State since the reasoning is the same and because of the grave consequences a charge may have for the accused or for a State party;

(c) It would be preferable to establish a Chamber to consider pre-trial rebuttals and challenges relating to the sufficiency of the indictment or jurisdiction. Since the Bureau of the court concerns itself with referral procedures as a chamber of indictment at this stage, it may consider the rebuttals submitted to it. The fact that it is the Bureau that issues the indictment does not detract from this, because it is above all else a judicial body of which it is assumed that it does not refer a case to the tribunal unless it has sufficient evidence for the charge.

17. We do not approve of the words "and its provisions had been made applicable in respect of the accused" that appear in square brackets in article 41 (a) in the light of the principle of the equal criminal responsibility of different individuals irrespective of national law or of whether or not a State party has met its commitment to criminalize in internal law the acts enumerated in international treaties.

18. In connection with article 44, we are in favour of trial <u>in absentia</u> if the accused has been notified but chooses not to appear before the court or if the accused has been arrested but escapes. We therefore agree with the formulation of situation (c) as given in the commentary to the article for the worthy reasons given there and in order to give the <u>in absentia</u> verdict a deterrent value for the international community, promote the achievement of justice and reaffirm the international rule of law by the punishment of whoever is proved to have committed an international crime. We support the view that judgements <u>in absentia</u> should be vacated if the accused is later apprehended and that he should be allowed to defend himself in the interests of justice.

19. Our views on article 45 are as follows:

(a) It is assumed that States parties will have approved the jurisdiction of the court and that they will therefore undertake to desist from instituting trial proceedings if the court should commence inquiries, so that the accused will not be brought to trial before two judicial organs at the same time. In this connection, the draft should address a number of questions concerning what States parties should do with regard to bringing the accused to trial before their national courts in the situation where the court has commenced investigations and whether their hands are tied or they can continue with their proceedings;

(b) Paragraph 2 (a) states that a person who has been tried by another court for acts constituting crimes referred to in articles 22 or 26 may be subsequently tried under the statute only if the act in question was characterized as an ordinary crime. The principle is that a person may not be tried again for the same criminal act even if it was characterized differently. Hence, if an act is characterized as aggravated assault a person cannot be retried for the same act characterized as torture or inhuman treatment. This does not preclude the possibility of bringing an accused person to trial if he has committed acts that constitute an international crime other than those for which he has been tried.

20. In another respect, paragraph 2 (b) of the article is sufficient to address this question, because whenever the trial is a "sham" proceeding it is possible to try the accused before the court on the crime either as characterized in the trial under national law or however else characterized.

21. If, however, the accused can be tried for the same act when characterized as an international crime, then it must be stipulated that the international tribunal should take account of whatever penalty has been imposed by the national tribunal.

22. Article 37 of the draft states that each of the Chambers of the court shall consist of five judges. In our view, all of these judges should attend all of the trial proceedings, including the hearings, the deliberations and the rendering of the judgement, so that the number of members of the Chamber is not less than that stipulated in article 37 and is not five for one case and four for another, thereby violating the principle of equal rights for the accused. Article 50, therefore, in stating that the presence of only four judges is sufficient, is in violation of the foregoing principles.

23. In connection with article 53, we consider that the determination of penalties should be part of international penal law and not of a procedural code and that a penalty should be established for each individual crime in conformity with the law concerning crimes and penalties.

24. Our views on article 55 are as follows:

(a) The article does not lay down any precise deadline for appeal against the judgement. This has the effect of allowing a judgement to be challenged at any time, thereby undermining the finality of the judgements of the tribunal;

(b) The Appeals Chamber should have more members than the court of first instance, preferably seven;

(c) It should be stipulated that a judge who has participated in the rendering of the initial judgement should not sit in the appeal proceedings, given that this is a basic guarantee in judicial proceedings.

25. In our view, no separate Chamber should be established to consider appeals for reasons of economy and because the number of appeals may not be large enough to require the establishment of a separate Chamber. It should rather be formed as needed by judges other than those who took part in the judgement contested.

26. Although most constitutions stipulate that citizens or nationals may not be extradited, when States parties accept the jurisdiction of the court the court shares jurisdiction with the national courts in considering these cases. This entails an obligation to surrender to it accused citizens or nationals in the event the court should so request.

MALTA

[Original: English]

[29 June 1994]

1. The Government of Malta takes note of and welcomes the report of the Working Group of the International Law Commission which contains a comprehensive and systematic set of draft articles on a draft statute for an International Criminal Court.

2. The Government of Malta supports the establishment of an international criminal court. This support has already been affirmed by Mr. Guido de Marco, Deputy Prime Minister and Minister for Foreign Affairs of Malta during the International Conference for Protection of War Victims held at Geneva from 30 August to 1 September 1993 and during the general debate of the forty-eighth session of the United Nations General Assembly. This position was reiterated during the Commonwealth Heads of Government meeting held in Cyprus in October 1993.

3. The Government of Malta believes that the relationship between the court and the United Nations is crucial both to the court's establishment and to its long-term viability. Therefore, Malta prefers that the court should be an organ of the United Nations. However, in the light of the practical and technical difficulties expounded during the debate on this subject, and in particular the controversy as to whether such an option would necessitate an amendment of the Charter of the United Nations, Malta could agree to the establishment of the court by a statute in the form of a treaty entered into by States. If this second option is adopted, it would be essential to create, through appropriate agreements, a close cooperative relationship between the court and the United Nations as this would greatly enhance the court's authority and effectiveness as well as its universal appeal.

4. Article 4 of the draft statute provides for a court which is not a full-time body but which would sit when required. While being aware that such an option is less costly and, therefore, more attractive to potential parties to the statute, the Government of Malta believes that the consequential weakening of the court caused by the lack of continuity and its diminished independence and authority might undermine its continued existence. The possibility that the President of the court might become full-time if circumstances so required does little to redress the problem.

5. With regard to the rest of part 1, which covers articles 1 to 21, it presents few problems to Malta.

6. Malta shares the Working Group's adoption of the principles that judges should not be eligible for re-election. At the same time it is felt that the 12-year terms could be shortened.

7. Part 2 of the draft statute is a serious attempt to address a series of complex issues. The basic approach adopted by the Working Group to the court's jurisdiction ratione materiae is shared by Malta. The compilation of a list of crimes defined by treaties such as that found in article 22 can provide the core of this jurisdiction. In this context, the setting up of an international criminal court, vested with jurisdiction to try crimes against humanity, war crimes, international terrorism and global traffic in narcotics will give an institutional concept in dealing with the international dimension of such offences.

8. Regarding article 23, Malta reiterates its position in favour of a flexible jurisdictional regime. This would encourage a larger number of States to become parties to the statute. The net result of both "opting-in" systems (alternatives B and C) achieves the aim of allowing States that desire to become parties to the statute to decide over which crimes they would be prepared to accept the court's jurisdiction. The initial presumption in favour of the lack of jurisdiction of the court in alternative A would probably make this alternative appear less inhibiting to potential States parties.

9. Note is taken of the fact that the Working Group's draft statute separates the establishment of the court from the entry into force of the draft Code of Crimes against the Peace and Security of Mankind. Any linkage between the court and the Code could prove detrimental to the early establishment of the court and therefore such linkage should be avoided.

10. While understanding the logic explained in the Working Group's commentary to article 25, Malta feels that the drafting of article 25 could be improved in the light of paragraph (2) of the commentary.

11. Malta fells that article 26 (2), which provides for the Court's jurisdiction over crimes under general international law may give rise to concerns over the proper application of the principle nullum crimen sine lege, since it is arguable whether such crimes are defined with a precision that is acceptable as a basis for criminal jurisdiction. This may cause difficulty for Malta in the light of section 39 (8) of the Constitution of Malta which states that:

"(8) No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severe in degree or description than the maximum penalty which might have been imposed for that offence at the time it was committed."

12. One may notice that this is very similar to article 7 of the European Convention on Human Rights, which speaks of the same principle in an almost verbatim manner, and article 11 of the Universal Declaration of Human Rights, which speaks out in favour of the principle. Furthermore, recognition of the jurisdiction of the international criminal court may mean constitutional changes, as well as extradition treaties with the States parties involved and the United Nations. All this implies necessarily an enormous amount of changes which will have to take place in the laws.

13. Malta is largely in agreement with part 3 to part 7 of the draft statute, which deal, inter alia, with several procedural issues of fundamental importance. It notes with approval that article 53 does not empower the court to award capital punishment. On the other hand, the possibility, albeit restricted, of holding trials in absentia, provided for in article 44 (1) (h), should not be included in a revised draft statute since there is little benefit in a purely declamatory justice that risks possible infringements of the rights of the accused.

14. In conclusion, Malta looks forward to the early submission by the International Law Commission of a revised version of the draft statute that has been prepared by the Working Group. Malta believes that the Commission's work on this subject-matter will prove to be a determining factor in successfully meeting the increasing need being felt in the international community for the establishment of an international criminal court.